



U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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Washington, D. C. 20536



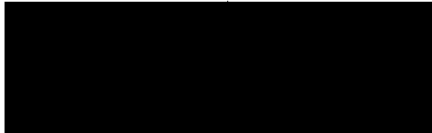
FILE: [REDACTED] Office: Manila

Date: FEB 04 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under §  
212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C.  
1182(a)(9)(B)(v)

IN BEHALF OF APPLICANT:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

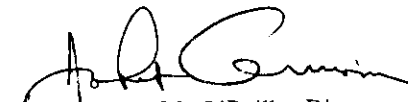
If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, Manila, Philippines, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Tonga who was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than 1 year. The applicant married a United States citizen on December 1, 1999 in Suva and is the beneficiary of an approved preference visa petition filed by her naturalized U.S. citizen brother. The applicant seeks the above waiver in order to return to the United States and reside with her spouse.

The officer in charge determined that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative (the applicant's spouse and parents) and denied the application accordingly.

On appeal, counsel states that the applicant's two children are suffering extreme hardship due to separation. Pursuant to § 212(a)(9)(B)(v) of the Act, hardship to a child in this matter is not a consideration.

On appeal, counsel states that the applicant's spouse and lawful permanent resident parents are suffering extreme emotional hardship by the continued prolonged separation.

On appeal, counsel also requests oral argument. 8 C.F.R. 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. The Service has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases which involve unique factors or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

The record reflects that the applicant was admitted to the United States in August 1982 at the age of 16 years and 10 months as a nonimmigrant visitor. She remained beyond her authorized period of stay and departed from the United States 16 years later in December 1998. The details of her trip in 1982 are unclear but her parents became lawful permanent residents in 1988. Counsel asserts that the applicant came to the United States at the age of 13 and for a significant period of time she was a minor under the direct control of her parents. The applicant completed high school and earned an associate in arts degree in May 1989. The applicant's entire family, parents and siblings, live in the United States.

Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) WAIVER. -The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); Matter of Soriano, Interim Decision 3289 (BIA 1996). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, Interim Decision 3281 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former

cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The record indicates that the applicant's two children are being cared for by the grandparents who indicate that due to age and poor health, they are under a tremendous amount of strain being responsible for two children.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.